

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

AMF TRUCKING & WAREHOUSING, INC.

and

Case 22-CA-25263

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA, AFL-CIO

Saulo Santiago, Esq. for the General Counsel.
Jeremy Meyer, Esq. for the Union.
David Greenhaus, Esq. and *Arthur Kaufman, Esq.*
for the Respondent.

DECISION

Statement of the Case

D. BARRY MORRIS, Administrative Law Judge: This case was heard before me in Newark, NJ on January 15, 2003. Upon a charge filed on June 27, 2002¹ and amended on August 14, a complaint was issued on October 30, alleging that AMF Trucking & Warehousing, Inc. ("Respondent") violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended (the "Act"). Respondent filed an answer denying the commission of the alleged unfair labor practice.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally and file briefs. The parties filed briefs on March 7, 2003.

Upon the entire record of the case, including my observation of the demeanor of the witnesses, I make the following:

Findings of Fact

I. Jurisdiction

Respondent has been engaged in the warehousing and trucking business. It has admitted, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. In addition, it has been admitted, and I find, that UAW (the "Union") is a labor organization within the meaning of Section 2(5) of the Act.

¹ All dates refer to 2002 unless otherwise specified.

II. The Alleged Unfair Labor Practice

A. The Facts

5 AMF and the Union were parties to a collective-bargaining agreement effective July 1, 2000 through June 30, 2001. Upon expiration of the agreement the parties began negotiations for a successor agreement. Negotiating sessions were held on October 30 and November 20, 2001 and March 6, 2002. Arthur Kaufman, Esq. and Meyer Gross represented Respondent. 10 Scott Sommer was the lead negotiator for the Union.

At the November 20 session the parties discussed overtime issues as well as the costs of the health insurance and pension plans. Kaufman and Gross caucused, at which time Kaufman testified that they calculated that the cost of the health insurance was \$3 per hour. 15 Kaufman testified that when they returned from caucus, he told the Union representatives that they were asking for “pie in the sky”. Sommer testified that besides the remark about “pie in the sky”, Kaufman also stated that “they bought the business in distress a year and-a-half earlier, and the company was still in distress”.

20 During the third session the Union representatives mentioned that not all of the employees were receiving the five-cent increase that they were supposed to receive. Sommer testified that when they were discussing the Union’s economic demands, Kaufman stated “they’re still fighting to keep the business alive”. Sommer also testified that Gross stated “the business was weaker this year than it was in previous years”. Sommer testified that he asked 25 whether the company was making a profit and that “they said they would have to check into that and get back to us, and we received no information about the company’s profit”.

On April 9, 2002 Sommer wrote to Kaufman, stating in part:

30 [D]uring the negotiations, the company has rejected all our economic proposals stating that the company was “in distress” when the current owners purchased it and that “it is still in distress”. It was further stated at negotiations ...that the company is “fighting to keep going” and that it is “weaker than last year”. As you have thus refused to make any 35 counter offer on our economic demands and are in essence claiming an inability to meet our economic demands we are therefore requesting to examine the company’s books and records to determine the validity of your claim.

40 On April 26 Kaufman responded to Sommer, denying Sommer’s version of what transpired at the negotiations. The letter stated, “your request to examine the books and records of the Company is denied”.

B. Conclusions and Discussion

1. Concluding Findings

45 Sommer appeared to me to be a credible witness. I credit his testimony that at the November 20, 2001 negotiating session Kaufman stated “they bought the business in distress a year and-a-half earlier, and the company was still in distress”. It is noteworthy that in his letter to Sommer of April 26, Kaufman stated, “at still another time, you inquired if the company was still in distress as it was at the time of the purchase and we responded affirmatively”.

I also credit Sommer's testimony that during the third session, when the Union's economic demands were being discussed, Kaufman stated "we're still fighting to keep the business alive" and that Gross stated that the "business was weaker this year than it was in previous years". In this regard Sommer's bargaining notes indicate that Kaufman stated that the business is "fighting to keep going" and that Gross stated that the business was "weaker than last year". Kaufman's bargaining notes for that session indicate that the question was asked, "How is business doing?" and the reply was "fair, worse than last year".²

I thus conclude that at the November 20, 2001 bargaining session Kaufman stated that when they bought the company it was in distress and the "company was still in distress". At the third session Kaufman stated that "they're still fighting to keep the business alive" and Gross stated that the business was "weaker this year" than in previous years. Sommer's question whether the company was showing a profit was not responded to.

2. Discussion

If a company claims inability to pay increased wages, its failure to substantiate the claim may result in a finding of a failure to bargain in good faith. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152-53 (1956). Inability to pay need not be expressed with any particular "magic phrase". *Monarch Machine Tool Co.*, 227 NLRB 1265, 1267 (1977); *Atlanta Hilton & Tower*, 271 NLRB 1600, 1602 (1984).

In *Lakeland Bus Lines*, 335 NLRB No. 29 (2001), after the company submitted its final offer to the union, the company's president sent a letter to the employees, which stated, in pertinent part, "we are trying to bring the bottom line back into the black". The Board stated (slip op. at 2): "We find that under *Truitt* ... and its progeny, the Respondent's ... letter to employees effectively communicated that it was unable to afford to pay anything more than that contained in its final offer". The Board held (slip op. at 5) that this claim "triggered an obligation to furnish the Union with the requested financial information". Failure to do so constituted a violation of Section 8(a)(5).

I believe that Respondent's statements that the company was "still in distress" and that they're still "fighting to keep the business alive", similar to the statement in *Lakeland*, *supra*, communicated that the company was unable to afford to pay anything more than its final offer. When the Union requested financial information to substantiate its claim, I believe that Respondent was required to furnish the information. Under *Lakeland*, *supra*, the failure to furnish such information is a violation of Section 8(a)(1) and (5) of the Act.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

² Counsel for Respondent contends that the entire statement was a question. A fair reading persuades me, however, that inasmuch as the question mark appears after "How is business doing?" that that was the question. I credit Kaufman's testimony that the reply was "fair, worse than last year".

3. The Union is the exclusive representative of the following appropriate unit of employees:

5 All warehouse employees employed by Respondent at its Carteret and Avenel, NJ locations, but excluding all office clerical employees, drivers, helpers, sales employees, professional employees, including guards and supervisors as defined in the Act.

10 4. By failing and refusing to furnish the Union with the financial information requested in its letter of April 9, 2002, Respondent has engaged in an unfair labor practice, in violation of Section 8(a)(1) and (5) of the Act.

15 5. The aforesaid unfair labor practice constitutes an unfair labor practice affecting commerce, within the meaning of Section 2(6) and (7) of the Act.

The Remedy

20 Having found that Respondent has engaged in an unfair labor practice in violation of the Act, I shall order it to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:³

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ORDER

30 The Respondent, AMF Trucking & Warehousing, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

35 (a) Refusing to provide UAW, AFL-CIO with the financial information it requested in its letter dated April 9, 2002.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

40 2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Provide the Union with the financial information requested in its letter dated April 9, 2002.

45 (b) Within 14 days after service by the Region, post at its facilities located in Carteret

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the Board shall as provided in Sec. 102.48 of the Rules, adopt the findings, conclusions, and recommended Order and all objections to them shall be deemed waived for all purposes.

and Avenel, NJ, copies of the attached notice marked “Appendix.”⁴ Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 9, 2002.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C.

D. Barry Morris
Administrative Law Judge

⁴ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading “POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD” shall read “POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.”

APPENDIX

NOTICE TO EMPLOYEES

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Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

10 The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

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Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

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WE WILL NOT refuse to provide the Union with the financial information it requested in its letter dated April 9, 2002.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

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WE WILL provide the Union with the financial information it requested in its letter dated April 9, 2002.

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AMF TRUCKING & WAREHOUSING, INC.

(Employer)

Dated _____

By _____

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(Representative)

(Title)

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The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

20 Washington Place, 5th Floor, Newark, NJ 07102-3110

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(973) 645-2100, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (973) 645-3784.

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